

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALS 1-26, et al.,

Plaintiffs,
v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

Case No. 4:21-cv-01236-O

**PLAINTIFFS' OPPOSITION TO MOTION FOR
CONSOLIDATED RESPONSE DEADLINE**

TO THE HONORABLE JUDGE O'CONNOR:

Defendants Austin and Del Toro, in their individual capacities, request a consolidated response deadline, which amounts to an extension of time to respond to the Complaint. In opposition, Plaintiffs state as follows:

1. Defendants Austin and Del Toro are sued in both their official and personal capacities. Compl. ¶¶ 23-24. There are no distinct causes of action that apply only to Austin and Del Toro in their individual capacities—only Plaintiffs' claim for damages. Compl. pp. 17-37.
2. Defendants Austin and Del Toro were served both in their official capacities (as the United States) and in their individual capacities. Defendants do not contest that the United States was properly served, nor that Defendant Austin was personally served. Defendants admit that the deadline for a responsive pleading is next Tuesday, January 18, 2022.
3. Defendants claim that Del Toro was never personally served, but that is incorrect. Del Toro was actually personally served *twice*, which Plaintiffs verified after individual-capacity counsel first asserted that service was inadequate (not until January 12, 2022).

4. Del Toro was personally served by certified mail delivered on November 16, 2021.

See Decl. of Joyce Flo ¶ 5, Ex. 1. This service complies with Fed. R. Civ. P. 4(i)(3), 4(e)(1), and Tex. R. Civ. P. 106 (a)(2).

5. After several attempts, Del Toro was also personally served by a process server on December 1, 2021, who left the Complaint and Summons at Del Toro's workplace with the individual who was the only authorized recipient onsite due to COVID-19. *See* Affidavit of Service for Defendant Del Toro, Dkt. 40; Flo Decl. ¶¶ 7-9, Exs. 2-4. This service complies with Fed. R. Civ. P. 4(i)(3) and 4(e)(2)(C).

6. Though Plaintiffs have been conferring with Defendants' counsel, the Department of Justice, for several months, Austin and Del Toro's individual-capacity DOJ counsel never participated despite clearly being aware of the lawsuit. They did not even file appearances until January 13, 2022 (Dkt. 67, 68), and did not contend that Del Toro had never been served until January 12, 2022, less than a week before the responsive pleading is due.

7. Individual-capacity counsel has never requested Plaintiffs' agreement for an extension of time for their responsive pleading due to press of business, inability to confer with their clients, illness, or other concerns. The premise of their request for additional time to respond stems only from their belated and incorrect claim that Del Toro was not personally served.

8. As Del Toro was personally served under both the Federal and Texas Rules of Civil Procedure, there is no grounds for extension of time on Del Toro's responsive pleading deadline.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that Defendants' motion for consolidated response deadline be denied.

Respectfully submitted this 17th day of January, 2022.

KELLY J. SHACKELFORD
Texas Bar No. 18070950

JEFFREY C. MATEER
Texas Bar No. 13185320
HIRAM S. SASSER, III
Texas Bar No. 24039157

DAVID J. HACKER
Texas Bar No. 24103323
MICHAEL D. BERRY
Texas Bar No. 24085835

JUSTIN BUTTERFIELD
Texas Bar No. 24062642
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy., Ste. 1600

Plano, Texas 75075
Tel: (972) 941-4444
jmateer@firstliberty.org
hsasser@firstliberty.org
dhacker@firstliberty.org
mberry@firstliberty.org
jbutterfield@firstliberty.org
rbyron@firstliberty.org

JORDAN E. PRATT
Florida Bar No. 100958* **
FIRST LIBERTY INSTITUTE
227 Pennsylvania Ave., SE
Washington, DC 20003
Tel: (972) 941-4444
jpratt@firstliberty.org

*Admitted pro hac vice
** Not yet admitted to the D.C. Bar, but
admitted to practice law in Florida. Practicing
law in D.C. pursuant to D.C. Court of
Appeals Rule 49(c)(8) under the supervision
of an attorney admitted to the D.C. Bar.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER
Texas Bar No. 24103325
ANDREW B. STEPHENS
Texas Bar No. 24079396
HACKER STEPHENS LLP
108 Wild Basin Road South, Suite 250
Austin, Texas 78746
Tel.: (512) 399-3022
heather@hackerstephens.com
andrew@hackerstephens.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2022, I electronically filed the foregoing document through the Court's ECF system, which automatically notifies counsel of record for each party.

/s/Heather Gebelin Hacker
HEATHER GEBELIN HACKER